

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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AUG 25 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0405
)	DEPARTMENT B
)	
Appellee,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
v.)	Rule 111, Rules of
)	the Supreme Court
JESUS MORENO-CLARK,)	
)	
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093679001

Honorable Richard S. Fields, Judge

VACATED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 Jesus Moreno-Clark appeals from the sentence imposed following the trial court's grant of the state's motion to vacate his original sentence made pursuant to Rule 24.3, Ariz. R. Crim. P. We agree the trial court lacked authority to resentence him and vacate his modified sentence.

¶2 Moreno-Clark was convicted after a jury trial of two dangerous offenses—armed robbery and aggravated assault with a deadly weapon—and fleeing from a law enforcement vehicle. After the verdicts, the state informed Moreno-Clark it would seek a concurrent prison sentence for a pending charge of prohibited possession of a weapon—a charge that had been severed from the counts Moreno-Clark was convicted of here—in exchange for his admitting two prior felony convictions. Moreno-Clark's counsel responded that she would have to review the records of those convictions before agreeing. The trial court scheduled a “status conference/priors trial” and set a sentencing hearing. Before the status conference, Moreno-Clark's counsel contacted the state by electronic mail, stating Moreno-Clark would admit the prior convictions and that the conference would be vacated.

¶3 At Moreno-Clark's sentencing, the prosecutor who had tried the case was unable to appear. Neither Moreno-Clark nor the prosecutor who did appear informed the trial court of the parties' agreement that Moreno-Clark would admit the prior convictions. Although counsel discussed Moreno-Clark's previous felony convictions, she provided the court with the sentencing ranges for a first-time offender pursuant to A.R.S §§ 13-702(D) and 13-704(A). Similarly, the presentence report, despite listing Moreno-Clark's previous convictions, also provided sentencing ranges for a nonrepetitive offender, and

the state took no position at sentencing. The court imposed concurrent, presumptive prison terms consistent with §§ 13-702(D) and 13-704(A), the longest of which was 10.5 years.

¶4 The state then moved to vacate those sentences, citing Rule 24.3, Ariz. R. Crim. P., and asserting that Moreno-Clark had agreed to admit his prior convictions and that the state was prepared to prove those convictions in order to enhance Moreno-Clark's sentences. After a hearing, at which Moreno-Clark's counsel did not oppose the state's motion and admitted Moreno-Clark had intended to admit his previous felony convictions, the trial court granted the state's motion. Moreno-Clark then admitted his two previous felony convictions during a colloquy held pursuant to Rules 17.2 and 17.6, Ariz. R. Crim. P. At a subsequent sentencing hearing, the court sentenced him in accordance with A.R.S. §§ 13-703(C) and (J), which govern sentences for repetitive offenders, imposing concurrent, minimum, and presumptive prison terms, the longest of which was fourteen years.

¶5 On appeal, Moreno-Clark argues the trial court lacked the authority to grant the state's Rule 24.3 motion. Rule 24.3 provides that a trial court "may correct any unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and sentence but before the defendant's appeal, if any, is perfected."¹ But, "if the sentence is neither 'unlawful' nor 'imposed in an unlawful manner' no jurisdictional

¹There is no dispute the state's motion was timely filed.

authority exists for the trial court to change the sentence.” *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984).

¶6 There is no question Moreno-Clark’s original sentences were lawful, falling within the statutory range. *See State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991). The state argues, however, that the original sentence was imposed in an unlawful manner because it “was entitled to the opportunity to prove [Moreno-Clark]’s prior convictions” and was deprived of its right to do so under Rule 26.7(a), Ariz. R. Crim. P., because Moreno-Clark “fail[ed] to honor the agreement regarding his priors and hid . . . [that agreement] from the trial court.”

¶7 A sentence is imposed in an unlawful manner if it is “imposed without due regard to the procedures required by statute or to the provisions of Rule 26, [Ariz. R. Crim. P.], relating to entry of judgment, the preparation of a presentence report, the conduct of the presentence hearing and the sentencing itself.” *State v. Suniga*, 145 Ariz. 389, 395, 701 P.2d 1197, 1203 (App. 1985). Rule 26.7(a) provides that the trial court “shall on the request of any party[] hold a pre-sentencing hearing at any time prior to sentencing.”

¶8 The state understandably did not object to Moreno-Clark’s motion to vacate the presentence hearing because it expected him to admit his prior convictions at sentencing. The state nonetheless had ample opportunity at sentencing to apprise the court of the parties’ agreement and failed to do so. And, had the state raised the issue and Moreno-Clark nonetheless refused to admit his prior convictions, the state then would have had the opportunity to request that the court set a priors trial for the purpose of

proving those convictions. In short, Rule 26.7(a) was not violated because the court did not deny any party's request for a presentence hearing. Furthermore, any ethical concerns arguably presented by the conduct of Moreno-Clark's counsel are not relevant. *See* ER 3.3, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. The state cites no authority, and we find none, suggesting a defendant's sentence is imposed unlawfully because the defendant did not inform the court of an agreement concerning his sentence.

¶9 Moreover, although the state asserts it was entitled to the opportunity to prove Moreno-Clark's prior convictions,² for the reasons described above, it plainly had that opportunity but declined to act. As Moreno-Clark correctly points out, the state had the burden of proof and therefore the burden of going forward with its allegations of prior convictions. *See State v. Kelly*, 210 Ariz. 460, ¶ 13, 112 P.3d 682, 686 (App. 2005) (“[T]he burden of proof actually consists of two parts: the burden of going forward (also called the burden of production or the burden of evidence), and the burden of persuasion.”); *State v. Cons*, 208 Ariz. 409, ¶ 9, 94 P.3d 609, 613 (App. 2004) (state has burden of proving prior conviction). Its failure to do so does not render Moreno-Clark's original sentence unlawful. Nor do we find any statute or provision of Rule 26 that was

²In support of this argument, the state cites *State v. Osborn*, in which Division One of this court noted, in a different context, that “the State is entitled to the opportunity of proving the prior felony conviction.” 220 Ariz. 174, ¶ 14, 204 P.3d 432, 437 (App. 2009). Nothing in *Osborn* suggests the state cannot voluntarily forgo that opportunity, as it did here.

violated by the imposition of Moreno-Clark's original sentences. We therefore cannot conclude his original sentences were unlawfully imposed.³

¶10 For the reasons stated, we vacate the trial court's order granting the state's Rule 24.3 motion and the subsequently modified sentences. Because the court lacked the authority to modify Moreno-Clark's original sentences under the circumstances, those sentences stand as imposed.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

³Although Moreno-Clark did not oppose the state's Rule 24.3 motion, and therefore has forfeited relief absent fundamental, prejudicial error, an illegal sentence constitutes fundamental error. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d 1069, 1080 (App. 2009). Moreover, because we conclude the trial court lacked the authority to resentence Moreno-Clark, we need not address his argument that his modified sentences violated the constitutional prohibition against double jeopardy.